92-6[illegible]

No.——

Supreme Court, U.S.
FILED
SEP 22 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARY A. RIFFE,

Petitioner,

v.

ROSSLYN C. BROWN and JAMES V. BROWN,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

PETITION FOR WRIT OF CERTIORARI

DAVID S. SKEEN
411 "D" Street
Post Office Box 8520
South Charleston, WV 25303
(304) 744-8125
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

A. Does a state court of last resort by refusing a petition for appeal in which said petition complains of a denial of due process by the tribunal of first instance, also violate due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States?

B. Does a State Court of last resort violate the Petitioner's constitutional right to due process of law under both the Fifth and Fourteenth Amendments to the Constitution of the United States by arbitrarily refusing a petition for appeal without grounds, when such refusal is contrary to the mandate of Article 8 § 4 of the Constitution of the State of West Virginia?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
LAW INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT	9
I. THE ARBITRARY REFUSAL BY THE WEST VIRGINIA SUPREME COURT OF APPEALS TO ALLOW THE PETITIONER'S APPEAL OF AN UNCONSTITUTIONAL INFRINGEMENT OF ABSOLUTE PROPERTY RIGHTS BY A LOWER COURT, WITHOUT DUE PROCESS OF LAW, CONSTITUTES A DENIAL OF DUE PROCESS IN AND OF ITSELF	9
II. THE REFUSAL OF THE WEST VIRGINIA SUPREME COURT OF APPEALS TO GRANT AN APPEAL WITHOUT CITING GROUNDS FOR SUCH REFUSAL CONSTITUTES A DENIAL OF DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION	15
CONCLUSION	16
APPENDIX	
A. Copy of Deed Granting Right of Way	1a
B. Order of Circuit Court of Kanawha County, West Virginia	5a
C. Order of West Virginia Supreme Court of Appeals refusing to grant appeal	9a
D. Refusal of Second Petition for an Appeal	

TABLE OF AUTHORITIES

Cases — Page

Central Land Company v. Laidley, 159 U.S. 103 (1895) 16
Clark v. West Virginia Board of Regents, 166 W.Va. 702, 279 S.E. 2d 169 (1981) 13
Hanshew v. Zickafoose, 313 S.E. 2d 427 (1984) 8
HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (1989) 14
Hoffman, et al. v. Smith, et al., 310 S.E. 2d 216 (1983) 7
In re Barto, 8 Bankr. 145 (1981) 13
Jenkins v. Johnson, —— W.Va. ——, 382 S.E. 2d 334 (1989) 8
Lockwood v. Ohio River Railroad Company, et al., 180 U.S. 637, 21 S.Ct. 920, 45 L.Ed. 710 (1900) .. 12
Lowe v. Guyan Eagle Coals, Inc., 273 S.E. 2d 91 (1980) 7
McDonald v. Board of Mississippi Levee Commissioners, 646 F. Supp. 449 (1986) 11
Ochoa v. Hernandez v. Morales, 230 U.S. 139, 57 L.Ed. 1427, 33 S. Ct. 1033 (1913) 10
Semler v. Hartley, 399 S.E. 2d 54 (1990) 8
Smith v. Hedrick, 382 S.E. 2d 588 (1989) 7

Statutes, Constitutions and Rule

28 U.S.C. § 1257(c) 2
42 U.S.C. § 1983 2
U.S. CONST. amend. V 2, 5, 8, 17
U.S. CONST. amend. XIV, § 1 ..... 2, 5, 8, 17
W. Va. Code § 55-13-1 5
W. Va. Code § 58-5-9 7
W. Va. CONST. art. III, § 10 ..... 2, 5, 8, 13, 14, 16
W. Va. CONST. art. VIII, § 4 ..... 2, 7, 15, 16
W. Va. R. Civ. P., Rule 57 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ———

MARY A. RIFFE,

Petitioner,

v.

ROSSLYN C. BROWN and JAMES V. BROWN,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The order entered in the Circuit Court of Kanawha County, West Virginia, on October 25, 1991, is contained in the appendix hereto.

The orders entered in the West Virginia Supreme Court of Appeals refusing to grant the appeal and refusing to renew the petition for appeal are contained in the appendix hereto.

JURISDICTION

Your petitioner brought suit in the Circuit Court of Kanawha County, West Virginia, seeking a declaratory judgment regarding an easement agreement affecting contiguous parcels of real estate, with the easement being located entirely on the servient estate. From an order entered by the Circuit Court of Kanawha County, West

Virginia, on October 25, 1991, your Petitioner petitioned the West Virginia Supreme Court of Appeals for an appeal of said Order. The West Virginia Supreme Court of Appeals by order entered June 24, 1992, refused said petition without citing any grounds whatsoever for such refusal.

Petitioner invokes the jurisdiction of this Court under 42 U.S.C. § 1983 and 28 U.S.C. § 1257(3) for the denial of her Constitutional rights under the color of law.

LAW INVOLVED

The law involved is a denial of property rights in violation of the Fifth Amendment to the United States Constitution, Fourteenth Amendment to the United States Constitution, Article III Section 10 of the Constitution of the State of West Virginia, and Article VIII Section 4 of the Constitution of the State of West Virginia.

STATEMENT OF THE CASE

On July 8, 1932, W.A. Sparks and Ella Sparks did grant and convey by express grant, an easement right-of-way to one Geraldine R. Green. This grant of easement over the property then belonging to W.A. Sparks and Ella Sparks was for the sole and exclusive purpose of permitting Geraldine Green to access a garage located at the back of her property to which she had absolutely no means of access except over, on and across the property of W.A. and Ella Sparks.

The express grant of easement was clear, unambiguous and precise in its purpose, intent, and scope, and narrowly defined the rights and privileges being conveyed by said easement agreement to the owner of the dominant estate, Geraldine Green. The instrument conveying and, thus, creating the instant easement was both definite and certain in its terms, scope of privilege, and intent. The express easement agreement as incorporated into the

deeds of both aforementioned parties is hereby appended to this petition to demonstrate the restrictiveness of its privilege granted and lack of ambiguity of the instrument itself creating the easement right of way at issue and the limited purpose for which it was created.

For approximately Forty-four (44) years, from July 8, 1932, the date of execution of the instrument creating this easement, to April, 1976, all parties inclusive of the successors in title to the original parties to this agreement, maintained the exclusive use of the easement for the sole purpose of ingress, egress and regress to and from said garage building and for no other purpose or uses whatsoever.

In April, 1976, Rosslyn C. Brown and James V. Brown acquired title to the land constituting the dominant estate to this easement agreement. Whereupon, Rosslyn Brown and James Brown immediately asserted joint ownership of the land comprising said easement right-of-way solely by virtue of the grant of easement. It must be clearly understood that the entire right-of-way was wholly situated on the property then and now owned by Mary Riffe, successor in title to the servient estate of W.A. and Ella Sparks.

Commencing with the occupancy of the dominant estate by Rosslyn C. Brown and James V. Brown, there began an immediate, unlimited occupancy and use of the land itself by the defendants/appellees upon which the easement was situated. The defendants began an unlimited usage of said land over which the easement was granted for any purpose, residential or commercial, which they deemed necessary to their own needs, and all to the detriment of the appellant herein. Thus, the owners of the easement, in April, 1976, exceeded the rights of usage granted in the easement/right of way on the land comprising this easement and dealt with the land upon which the easement exists in an unrestricted manner as if they

were the owners of the land itself. Rosslyn C. Brown and James V. Brown, her spouse, unilaterally broadened their usage to encompass any and all uses they deemed necessary, did not confine their usage to the particular purposes as set forth in the easement/right of way and conducted themselves in total disregard of the express grant and the limits it inherently imposed upon them as the dominant estate. Such abuse of privilege included, but was not limited to, utilizing the land over which the easement ran for the parking of their vehicles, loading and unloading of trucks and automobiles, access to all areas of the land comprising the dominant estate, and fraudulently obtaining municipal permits for altering the single family residence on the dominant estate to a multi-family residence, with the easement being represented by the defendants as an unrestricted access to off-street parking for tenants on a concrete pad constructed by them. All such uses were freely engaged in despite protestation by Mary Riffe, the owner of the land and Petitioner in this case.

On July 27, 1977, Mary Riffe sought injunctive relief in the Circuit Court of Kanawha County, West Virginia, to restrict the usage of her land to that permitted by the express grant of the easement. Judge Patrick Casey of the Circuit Court of Kanawha County, West Virginia, was the presiding judge in this matter at that time. Injunctive relief was, upon hearing, at first granted by Judge Patrick Casey in said hearing on the above date, but later Judge Casey refused to sign the Order granting a preliminary injunction and indicated a predisposition to enlarging and expanding the privileges conveyed by the express grant of easement despite its clear language and obvious intent to the contrary. On September 6, 1977, Judge Casey entered an Order denying the motion for preliminary injunction.

In light of this action as taken by Judge Casey, and Mrs. Riffe's inability to sustain the financial burden im-

posed upon her in regard to the furtherance of her legal remedies to protect her property rights, Mary Riffe requested that this case be maintained as open but inactive on the docket of the Circuit Court of Kanawha County, West Virginia which request was complied with by the Circuit Court. Throughout the subsequent time, Rosslyn C. Brown and James V. Brown aggressively and unlawfully continued their possession and use of the land on which the easement existed and continued their unrestricted usage in the face of the owner's clear and open objections to the excessive and impermissible use of the land in question. Furthermore, at no time did Mr. or Mrs. Brown compensate the lawful owner of the land, Mary Riffe, for this greatly expanded usage of the property, nor did they contribute to any upkeep or repair for the damages this increased and burdensome usage was directly causing to the land in question and property of the plaintiff. By such actions as these, Mary Riffe was deprived, not only of her inherent property rights, but of the very enjoyment of her property.

Therefore, on July 27, 1990, Mary Riffe again pursued legal remedy to this unlawful taking of her property by filing a declaratory judgment action to define the rights and privileges conveyed by the express grant of easement pursuant to the West Virginia Code § 55-13-1 and Rule 57 of the West Virginia Rules of Civil Procedure. It was her belief that such definitive action would restrain the parties of the dominant estate from their continued abuse of their privilege and end the unauthorized and impermissible use of her property. Said motion for declaratory judgment was assigned to Judge John Hey of the Circuit Court of Kanawha County, West Virginia, for adjudication. Whereupon the defendants sought out Judge Patrick Casey and prevailed upon him to seek reassignment of this case back into his court. Upon Judge Casey's request for reassignment of this case to his docket, it was so accomplished and Judge Casey then ren-

dered his decision, and pursuant to the submission by both parties of memorandums of law, issued an order defining the rights and privileges conveyed by this express grant of easement on October 25, 1991. Judge Casey's order is appended to this petition. The latitude granted to the dominant estate to use the realty of the servient estate is evident in the order hereto appended.

Without any case law or existing precedent, in support of an expansion of usage, Judge Casey proceeded to grant his judicial approval by means of his order of October 25, 1991, to the unlawful and continuing use of the plaintiff's property by the defendants. By abuse of judicial discretion alone he incorporated new language not found in the original instrument and, further, arbitrarily and capriciously assumed an intent and purpose not supported by evidence or past usage. Judge Casey dismissed all limitations imposed by the actual written instrument and ordered the continued use of the plaintiff's land based solely on the needs of the defendants. Furthermore, Judge Casey made no provision for, nor consideration of, the damages wrought by this expanded usage and, thus, deprived the plaintiff of her property all to her detriment and damage, without any just compensation of any kind being awarded in the aforesaid Order.

With his order, Judge Casey violated Mary Riffe's inalienable rights, and the protection of said rights, as guaranteed by both the Fifth and Fourteenth Amendments of the Constitution of the United States and Article III § 10 of the Constitution of the State of West Virginia. His order by the very arbitrary nature in which it was conceived and issued, and its gross disregard for the well established limitations in law pertaining to and intrinsic in easements and the rights and privileges they convey, deprived the plaintiff petitioner of her property without due process of law.

Thereupon, in February, 1992, Mary Riffe sought review of the order of October 25, 1991, and redress of the

wrong it imposed by infringement of her constitutionally guaranteed rights, and petitioned the West Virginia Supreme Court of Appeals for review and reversal of the judgment entered in the Circuit Court of Kanawha County, West Virginia. Said appeal was properly and timely filed pursuant to the Rules of Appellate Procedure as promulgated by the West Virginia Supreme Court of Appeals.

On June 24, 1992, at a regular session of the Supreme Court of Appeals in Charleston, West Virginia, the Supreme Court made and entered an order refusing the petition for appeal, citing no grounds whatsoever for such refusal. The refusal of the petition for appeal without grounds being cited is, by the West Virginia Code § 58-5-9, and the West Virginia Supreme Court of Appeals interpretation and application of the aforementioned code, not a decision on the merits, but is no more than a refusal to docket the petition for appeal, as such rejection was not clearly refused on the cited ground that the judgment complained of was "plainly right and that no other petition would be entertained by the Court". *Smith v. Hedrick*, 382 S.E. 2d 588 (W.Va. 1989). Further, the Supreme Court upon failure to docket said appeal for hearing and review precluded, by this action, any further consideration of the merits of the issues presented in this appeal, and by said refusal to accept the appeal further perpetuated the denial of due process of law originated in the lower court or tribunal of first instance.

Additionally, the Supreme Court of Appeals of West Virginia acted in total disregard of Article VIII § 4 of its own State Constitution in arbitrarily refusing this petition and failing to set forth the grounds for such refusal after a careful review of the record and issues contained therein, said issues having been routinely and consistently accepted for hearing in many recent appeals to this same court of appeals. *Lowe v. Guyan Eagle Coals, Inc.*, 273 S.E. 2d 91 (W.Va. 1980), *Hoffman, et al.*

v. Smith, et al., 310 S.E. 2d 216 (W.Va. 1983), *Hanshew v. Zickafoose*, 313 S.E. 2d 427 (W.Va. 1984), *Jenkins v. Johnson*, —— W.Va. ——, 382 S.E. 2d 334 (W.Va. 1989), *Semler v. Hartley*, 399 S.E. 2d 54 (W.Va. 1990).

On July 20, 1992, your petitioner, upon motion to the West Virginia Supreme Court of Appeals for good cause, sought an enlargement of time in order to renew her petition, as permitted by the Rules of Appellate Procedure. The Supreme Court of Appeals did not deny this motion for extension of time in which to appeal this judgment, but simply again refused her petition for appeal as an out-of-time second petition. Thus, the Court of last resort arbitrarily barred any further remedy or redress of the infringement of the petitioner's constitutional rights as guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and Article III § 10 of the West Virginia State Constitution.

As of the date of the filing of this appeal to the United States Supreme Court, the instant judgment of October 25, 1991, stands intact as rendered by Judge Casey, and exists as clear precedent that upon an arbitrary and abusive exercise of judicial discretion, an express grant of easement can be altered and expanded to allow and encourage full dominion over the land upon which an easement is granted, to the possessor of the easement. That as such, the dominant estate can by an abuse of judicial discretion alone take full possession of another's land and use said realty for whatever purpose without due process of law, which has clearly and always stood as requisite to such a taking of property.

REASONS FOR GRANTING THE WRIT

I. THE ARBITRARY REFUSAL BY THE WEST VIRGINIA SUPREME COURT OF APPEALS TO ACCEPT FOR REVIEW AN APPEAL OF AN UNCONSTITUTIONAL INFRINGEMENT OF ABSOLUTE PROPERTY RIGHTS BY A LOWER COURT, WITHOUT DUE PROCESS OF LAW, CONSTITUTES A DENIAL OF DUE PROCESS IN AND OF ITSELF BY THE COURT OF LAST RESORT.

A most basic and sacred right to each citizen is that of the right to acquire, hold, enjoy and dispose of one's property. As a most fundamental protection of that right and other rights as guaranteed by the Constitution of the United States, is the concept and precept of due process of law. The very phraseology of these words denotes a process that insures and promotes the fair and orderly administration of the laws of the land. This administration of the law is not an academic process but a process built upon sound principles and reasonable application of those principles for the common good. The due process clauses of both the state and federal constitutions afford an even-handed protection against arbitrary, capricious and unreasonable application of laws without respect for uniformity and fairness.

The most valued effect of adherence to the concept and practice of due process of law in the administration of justice is the reliability in following a prescribed mode of dispensation of justice to achieve a reasonably fair and just end to the equal protection of all parties under the law. Without an adherence to the spirit and intent of this concept of due process, there can be no reliance or reason to rely on a system of laws by which we are governed in our present society of many differing issues and conflicts.

In this case, there has been a very clear and grave infringement of a constitutionally guaranteed right, namely, the right to own and enjoy private property.

This case embodies a failure of state law to rely on due process to circumvent this infringement of that right and protect the abused right from being arbitrarily abridged and attacked without remedy or recourse. The petitioner, Mary Riffe, has, in seeking protection under the due process of law, attempted to protect and preserve her right as the owner of the realty in question and maintain possession of this property in a manner permitted her as is her guaranteed right under the Constitutions of both her country and her state. However, in seeking legal redress of the wrong committed against her by the unlawful taking of her property by another individual, the very system which is to protect her right has been the vehicle by which this infringement was accomplished. The curtailing and deprivation of her right to do with and enjoy her property as is strictly permitted and protected by virtue of her ownership in fee simple has been encouraged and supported by an abuse of judicial discretion.

The effect of the guaranty of due process of law is to inhibit the taking of one person's property and giving it to another, in complete derogation of settled and established modes of procedure and without fair and reasonable opportunity for a hearing of the issues. *Ochoa v. Hernandez v. Morales*, 230 U.S. 139, 57 L. Ed. 1427, 33 S. Ct. 1033.

In entering the Order of October 25, 1991, in the Circuit Court of Kanawha County, West Virginia, there was such a grave and unprecedented departure from existing state and federal law regarding easements, that the departure belies simply addressing the Court's action as simple judicial error. The presiding judge, solely relying on an abuse of his judicial discretion, arbitrarily added language not found in the original instrument of agreement and in doing so liberalized and expanded the limits and privileges conveyed by that instrument to benefit of the dominant estate. Without benefit or support for his decision in any existing law or case precedent, the Court,

under color of judicial authority, undertook a reformation of a written easement agreement to permit the unconstitutional taking of a property from one individual to give it to another. This was an arbitrary and capricious act by the Circuit Court which violates all aspects of due process of law and equal protection under the law. It is violative of the very foundation of the right to property as promised by the Fourteenth Amendment to the United States Constitution, and as heretofore protected by this Court.

In *McDonald v. Board of Mississippi Levee Commissioners*, 646 F. Supp. 449 (N.D. Miss. 1986), it was firmly held, as it always has been held, that an easement is a right that one has to use another's land for a specifically defined purpose that does not infringe, nor can be deemed as inconsistent, with the other's ownership. Further, if the easement is created by instrument and that instrument is definite and clear, the instrument must be taken at face value. This is consistent with both federal and West Virginia State law. More importantly, all judicial decisions and actions in the State of West Virginia have been predicated on this principle and no exception to this finding exists except for the Order of Judge Patrick Casey now standing as precedent.

The principle in law that the granting of an easement is not an acceding of the rights of ownership of the land itself is well-established law. Yet, by mere arbitrary abuse of judicial discretion, this established principle of law was ignored and struck down, and a written instrument, duly executed and recorded, was reformed, altered and changed to unfairly and unlawfully remove property rights from one person to give them to another. The United States Supreme Court has in its rulings never condoned nor permitted such action against any individual, even in instances where the need of the party or entity requesting expanded privilege was of a far more substantial basis than in the instant matter. More to the point, this taking of private property for another person's

private uses has never been condoned without strict adherence to due process of law as a requisite to the taking of property. While the petitioner sought a clarification and defining of the privilege conveyed in her easement agreement from the Circuit Court, she has never been permitted to be heard against such taking of her property as occurred by order of that Court in any tribunal. Moreover, she has never been given any consideration for the loss she sustained by this taking of her property. In *Lockwood v. Ohio River Railroad Company, et al.*, 103 F. 243 the Fourth Circuit Court of Appeals held that a written grant of easement would be strictly followed in defining the rights and privileges conveyed and that no greater estate would be conveyed than intended by the instrument. This has been law both in the federal and state jurisdictions and with the exception of the Order herein appealed now standing in the Circuit Court of Kanawha County, West Virginia, has been uniformly applied to all citizens except your petitioner.

In summary, there exists a substantial Federal question in this case by virtue of the action taken by the Courts of West Virginia in permitting an abusive reformation of the easement agreement, thus constituting a taking of property of the petitioner without just cause or compensation for such reformation. Further, such action is contrary to the Constitution of the United States and diminishes all previous law regarding easements and the effect of an easement upon ownership rights of the grantor. The Circuit Court of Kanawha County, West Virginia, has ruled that a legal and binding written agreement granting an easement right-of-way is subject to arbitrary change and alteration without good cause or consideration for due process as demanded by Constitutional law. In removing property from one person to give it to another, an abuse of judicial discretion will now suffice in accomplishing this end which is repugnant to the mandates of constitutional law both within a state and federally.

Upon appeal of this matter to the West Virginia Supreme Court, it was well-established law that due process must be given before any property deprivation can occur unless a compelling public policy dictates otherwise. *Clarke v. West Virginia Board of Regent*, 166 W.Va. 702, 279 S.E. 2d 169 (1981). In appeal to the court of last resort in this instance, it was clearly evident that the order complained of was an extraordinary deviation from accepted law and practice regarding property rights and that as such, it could greatly effect and touch upon the guaranteed right of due process before any such taking of any citizen's property occurs. The guaranty of due process of law is one of the most important to be found in the federal constitution. It is certainly central in the principle of ordered justice and is essential to the basic concept of private property. *In re Barto*, 8 Bankr. 145 (Bankr. E.D. Va. 1981). The gravity of the foundation of the case and the issues to be considered certainly provided the Supreme Court of Appeals of West Virginia with notice that a possible deprivation of constitutionally protected rights was at issue and that property may have been taken without due process of law. Therefore, the Court's refusal to hear this petition for appeal without grounds was in itself not only a perpetuation of the denial of due process, but a denial of due process itself. Mary Riffe, the Petitioner, had no hearing applying any precedent whatsoever regarding the loss of her property. No court or tribunal considered just compensation for the expanded privilege granted the defendants by Judge Casey's Order and no consideration was given to the just cause for such taking of property.

Article III, Section 10, of the West Virginia Constitution, which is the due process clause, mandates that whenever property is taken, consideration must be given to the just cause for such taking and just compensation for any loss of property which occurs. Mary Riffe was deprived of a cognizable property interest by the capricious, arbitrary action of the lower court. Therefore, it was in-

cumbent upon the West Virginia Supreme Court of Appeals to determine if, in fact, the Fifth Amendment had been violated by inquiring into three necessary areas: (1) whether Judge Casey's order constituted a taking (2) if a taking had occurred, whether it was for a public or private use and, (3) if the taking was for a permissible purpose, if just compensation was paid. Even more importantly, the West Virginia Supreme Court exceeded its discretionary authority by ignoring the infringement of the rights of Mary Riffe in violation of Article III, Section 10 of the West Virginia State Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States.

The right of appeal is not an inherent right in the United States Constitution nor in the West Virginia State Constitution. However, Article III § 10 in the West Virginia Constitution mandates that whenever property is taken, serious and careful procedures must be adhered to prior to such taking. The West Virginia Supreme Court of Appeals abused its discretion by ignoring that clear mandate and their failure to act to insure it was followed by their judicial silence on the appeal was a denial of due process to Mary Riffe. The test of the validity of this assumption is that your petitioner has lost a significant and cognizable property interest to another individual and no hearing before any tribunal has considered the just cause for such loss, nor the compensation to be paid if any. *HMK Corp. v. County of Chesterfield*, 616 F. Supp. 667 (E.D. Va. 1985).

Therefore, Mary Riffe has come before the United States Supreme Court to seek due process of law as guaranteed by the United States Constitution. The court of last resort in her state has stood silent on the issues intrinsic to the taking of her property, and it is incumbent on her to seek a post-deprivation remedy through the only court left to her. It is beyond doubt that property rights are protected by state law. This petitioner comes

before the United States Supreme Court directly as a result of the petitioner being subjected to a deprivation of property under color of state law without remedy or redress for such violation of her rights within her state.

This writ has not been submitted to this Court to complain of an unfavorable outcome by simple judicial error, but brings before this Court an intrinsically important issue that transcends the academic or episodic. Mary Riffe has been denied a right by a Circuit Court of West Virginia in violation of her rights as guaranteed by the United States Constitution. Further, the West Virginia Supreme Court of Appeals has stood silent on this issue and refused hearing to the petitioner. Petitioner states that this refusal of her appeal, given the issues and circumstances complained of, is a denial of due process of law. By refusal to hear and weigh the actions of a lower court in this instant matter, the West Virginia Supreme Court of Appeals has denied to this petitioner the only means to redress and remedy an unconstitutional taking of her property, and, thus, has denied her due process of law.

II. THE WEST VIRGINIA SUPREME COURT OF APPEALS HAS REFUSED TO ACCEPT A PETITION FOR APPEAL IN THIS MATTER IN VIOLATION OF THE MANDATES OF ARTICLE VIII, § 4 OF THE WEST VIRGINIA STATE CONSTITUTION. THIS ARBITRARY ABUSE OF JUDICIAL DISCRETION IS A DENIAL OF DUE PROCESS OF LAW.

Article VIII § 4 of the West Virginia Constitution states as follows:

> "A writ of error, supersedeas or appeal shall be allowed by the Supreme Court of Appeals, or a justice thereof, only upon a petition assigning error in the judgment or proceedings of a court and then only after the court, or a justice thereof, shall have examined and considered the record and is satisfied that there is probably error in the record, or that it presents a point proper for consideration of the Court . . .

> When a judgment or order of another court is reversed, modified or affirmed by the Court, every point fairly arising upon the record shall be considered and decided; the reasons therefore shall be concisely stated in writing and preserved with the record . . ."

While the above article does not require the supreme court to accept and hear every petition for appeal, it clearly mandates that they carefully review every petition for appeal before accepting or denying it for review and record their findings. The Supreme Court of Appeals has a statutory duty in reviewing the judgment of a lower court to fully consider every point fairly arising upon the record and record in some fashion their opinion.

To arbitrarily or capriciously deny a petition for appeal without grounds or statement as to its merits in the instant matter, is a denial of due process of law. If the West Virginia Supreme Court of Appeals was of the opinion that the instant matter was not found to have merit or sufficient grounds for their review, this finding should have been set forth as mandated by Article VIII § 4 of the West Virginia Constitution.

However, the failure to cite grounds and then to summarily refuse the petition for appeal, particularly subsequent to the denial of due process by the lower court, is in itself a denial of due process of law. This petitioner was denied, without reason, a review of the issues complained of in her petition for appeal and this was an arbitrary abuse of discretion in light of Article III § 10 and Article VIII § 4 of the West Virginia State Constitution.

CONCLUSION

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment to the Constitution of the United States". *Central Land Company v. Laidley*, 159 U.S. 103.

Petitioner states that she has not been fully heard in the course of judicial proceedings. Further, she has been denied property by an arbitrary and excessive abuse of judicial discretion by a lower court in West Virginia, and further by the West Virginia Supreme Court of Appeals which has arbitrarily refused to hear this matter without grounds or comment in violation of the State Constitution. Petitioner submits that such practice and procedure as evidenced in the conduct of the West Virginia Supreme Court of Appeals, violates due process of law and equally violates her rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, all amounting to an unlawful and impermissible taking of her property without due process of law.

The Petitioner respectfully prays that her petition for certiorari be granted. This petition presents the only opportunity for the petitioner to seek review of her Constitutional right not to be deprived of her property without due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Your petitioner prays that this court deem that the actions of the West Virginia Supreme Court of Appeals constitute a denial fo due process and that the matter be remanded to the West Virginia Supreme Court of Appeals for appropriate disposition, as mandated by both the United States Constitution and the Constitution of the State of West Virginia.

Respectfully submitted,

DAVID S. SKEEN
411 "D" Street
Post Office Box 8520
South Charleston, WV 25303
(304) 744-8125
Counsel for Petitioner

Dated: September 22, 1992

APPENDICES

APPENDIX A

W.A. SPARKS AND ELLA SPARKS
TO
GERALDINE R. GREEN

#2015 (EW)

Right of Way Driveway Agrt.

This Deed, made this 8th day of July, 1932, between W.A. Sparks and Ella Sparks, his wife, parties of the first part, of the City of Charleston, Kanawha County, West Virginia, and Geraldine R. Green, widow, party of the second part, of Canyon, Texas.

Whereas, the said parties of the first part are the owners in fee simple of a certain lot or parcel of land situate and fronting 40 feet by 124.5 feet on the southwest or river side of Lee Street in the City of Charleston, Kanawha County, West Virginia, being the same property conveyed to the said W.A. Sparks by J.L. Davis and Mary M. Davis, his wife, by deed bearing date the 5th of November, 1913, recorded in the office of the Clerk of the County Court of Kanawha County, West Virginia in deed book No. 141, at page 150, reference to which deed is hereby made for a more particular description of said lot or parcel of land, and

Whereas, the said Geraldine R. Green, widow, is the owner in fee simple of a certain other lot or parcel of land situate and fronting 40 feet by approximately 124 feet on the southwest or river side of Lee Street in said City of Charleston, being the same property conveyed to the said Geraldine R. Green by American Audit Company, a corporation, by deed bearing date the 8th day of January, 1926, recorded in said Clerk's Office in deed book

No. 294, at page 466, reference to which deed is hereby made for a more particular description of said lot or parcel of land, which said lot adjoins the lot owned by the said parties of the first part on the upper or easterly side thereof, and

Whereas, the said parties of the first part and the said party of the second part have heretofore constructed at their joint expense a certain double garage building now situate in the rear of said two lots, one-half thereof situate on the said lot owned by the parties of the first part and one-half thereof situate on the lot owned by the party of the second part, ingress and egress to said garage building being across, through, over and upon a certain driveway approximately 8 feet in width, extending from the curb line on the southwest side of said Lee Street to said double garage upon the rear of said two lots, which said driveway is situate wholly upon the lot belonging to the said parties of the first part and has heretofore been used jointly by the parties hereto, and

Whereas, the parties hereto mutually desire to provide for the permanent continued joint use of said driveway in the manner hereinafter provided.

Now, therefore, this Deed Witnesseth;

That for and in consideration of the sum of twelve hundred dollars ($1200.00) cash in hand paid by the said party of the second part to the said parties of the first part and other good and valuable considerations, the receipt of all of which is hereby expressly acknowledged, the said parties of the first part do hereby grant and convey unto the said party of the second part, her heirs, executors, administrators and assigns forever, a perpetual easement or right of way over, through, across and upon said driveway as now located and used upon the lot owned by the said parties of the first part, said driveway being approximately 8 feet in width and extending back from the curb line on the southwest side of Lee

Street in front of said lot towards the Kanawha River a distance of approximately 104.5 feet, more or less, for the purpose of ingress, egress and regress to and from said double garage building situate upon the properties of the parties hereto, as aforesaid, with the right in said party of the second part, her heirs, executors, administrators or assigns and the owners or occupiers for the time being of the lot and the improvements situate thereon now owned by the said party of the second part to freely use said driveway at all times, in common with the said parties of the first part, their heirs, executors, administrators or assigns and the owners and occupiers for the time being of said lot and the improvements thereon belonging to the said parties of the first part.

It is mutually covenanted, agreed and understood between the parties hereto that said driveway shall at all times hereafter be maintained in proper repair and in a condition suitable for the purposes for which the same is intended, the expense of all necessary repairs to said driveway to be shared equally between the said parties hereto, their heirs, executors, administrators or assigns.

It is further mutually covenanted, agreed and understood between the parties hereto that said driveway as now located shall at all times hereafter remain open and unobstructed for the full and free use of the same as a joint driveway to the garage building now situate upon the properties owned by the parties hereto, or to any other buildings or garages which either of the parties hereto may erect upon either of said lots.

Witness the following signatures and seals;

W.A. Sparks (SEAL)

Ella Sparks (SEAL)

(STAMPED $1.50)

State of West Virginia,

County of Kanawha, to-wit;

I, Mae M. Childress, a Notary Public of the said County of Kanawha, do certify that W.A. Sparks and Ella Sparks, his wife, whose names are signed to the foregoing writing, bearing date the 8th day of July, 1932, have this day acknowledged the same before me in my said County.

Given under my hand this 8th day of July, 1932.

Mae M. Childress, Notary Public,
Kanawha County, West Virginia.

My commission expires December 6, 1937.

State of Texas

County of Randall, to-wit;

I, Travis Shaw, a Notary Public of the said County of Randall, State of Texas, do certify that Geraldine R. Green, widow, whose name is signed to the foregoing writing, bearing date the 8th day of July, 1932 has this day acknowledged the same before me in my said County.

Given under my hand this 15th day of July, 1932.

(NOTARIAL SEAL)

Travis Shaw, Notary Public,
Randall County, Texas

My commission expires June 1, 1933.

West Va. Kanawha County Court Clerk's Office Jul 19, 1932

This deed was this day presented to me in my office, and thereupon together with the Certificate thereto annexed, is admitted to record.

Teste;

/s/ [Illegible]
Clerk
Kanawha County Court

APPENDIX B

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

Civil Action No. 90-C-2836

MARY A. RIFFE,

Plaintiff,

vs.

JAMES V. BROWN,

Defendant.

ORDER

[Filed Oct. 25, 1991]

This day came the parties hereto by their respective counsel and having previously submitted Memorandums of Law in support of their respective positions in this matter are now apprised of the Court's ruling as follows:

WHEREAS, this Court, after careful review of the Memorandum's of Law submitted by the parties hereto finds and orders as follows:

1. That the deed involved, and the right of way created therein, which is the subject of this action does not restrict the ingress and egress of the parties hereto insofar as that ingress and egress is made in route to some other structure or building which is located on the rear side of the subject property of either party.

2. That the existing concrete pad which is located in the rear portion of the defendant's lot does not constitute a building or structure as defined in the common law definition of such, said definition being, a structure with

a roof that a person may enter in one way, turn around, and exit.

3. This Court further finds that there are currently no buildings or structures on the property of either of the parties hereto, excluding the dwelling houses located thereon, that would fit the common law definition of a building or structure, aside from the common wall garage that is currently being used by the parties hereto.

4. This Court further finds that the deed and its right of way, which are the subjects of this action does not limit the defendant's, or the plaintiff's right to, at some time in the future, erect a structure that would comply with the common law definition of a building or structure, and would thereby be included in the definition of ingress and egress as set forth in the above-referenced deed.

5. This Court further finds that there is not contained in the aforesaid deed any restrictions placed on the number of buildings or structures that the defendants can place on their lot.

6. This Court further finds that as a result of the interpretation of the deed and its right of way which is the subject of this action, both parties hereto should have free and unobstructed use of the common driveway.

7. This Court finds that any structure that may be placed on the property of either of the parties hereto, provided such structure fits within the common law definition, as set forth above, may use the common drive as a means of ingress and egress to said structures.

8. The Court finds that an express easement has been granted through a deed and the plaintiff's property is the servient estate, with the defendant's property being the dominant estate, however, the use of said easement thus far is not considered an unreasonable use and has not placed an unreasonable burden on the servient estate of the plaintiff.

9. That the right of way granted is approximately 8 feet in width and extending back from the curb line on the southwest side of Lee Street in front of the property of the plaintiff as the said curb line was located on July 8, 1932, a distance of approximately 104.5 feet, more or less, shall be unobstructed by the plaintiffs and defendants, their successors and assigns.

10. That the defendants hereto do have a right to use the aforesaid right of way for purposes of ingress and egress to park vehicles on the concrete pad currently located on the rear of their lot, but said right shall not be exercised for an unreasonable or extended period of time.

It is therefore ORDERED and ADJUDGED that the right of way herein, which establishes the common driveway, does restrict either of the parties hereto from blocking the common driveway for an unreasonable amount of time.

That neither of the parties hereto may exceed the use for which the easement is granted and said use must be confined to the terms and purposes of the grant, however this use or limit thereon shall not be implied to limit the rights of the parties hereto to erect additional structures on the subject portions of their lot and shall not restrict their right to use the common driveway as a means of ingress and egress from said structures which are currently located on the subject premises of the parties or may in the future be located thereon.

To all of which the plaintiff and the defendants excepts and objects.

ENTERED this 25th day of October, 1991.

/s/ Patrick Casey
Judge

Date: 10-25-91

Presented By
Counsel for Defendants:

/s/ Robert N. Bland
ROBERT N. BLAND
BLAND & BLAND
1550 Kanawha Boulevard, E.
Charleston, WV 25311

Reviewed By
Counsel for Plaintiff:

/s/ David S. Skeen
DAVID S. SKEEN
P.O. Box 8520
South Charleston, WV 25303

APPENDIX C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of June, 1992, the following order was made and entered:

No. 920378

MARY A. RIFFE,
Plaintiff Below,
Petitioner

vs.

ROSSLYN C. BROWN and JAMES V. BROWN,
Defendants Below,
Respondents

On a former day, to-wit, February 28, 1992, came the petitioner, Mary A. Riffe, by David S. Skeen, her attorney, and presented to the Court her petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 25th day of October, 1991, with the record therein accompanying the petition, which being seen and inspected by the Court is hereby refused. Chief Justice McHugh and Justice Brotherton would grant.

A True Copy

Attest: /s/ Gail G. Ramey
Clerk
Supreme Court of Appeals

APPENDIX D

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 21st day of July, 1992, the following order was made and entered:

No. 920378

MARY A. RIFFE,
Plaintiff Below,
Petitioner

vs.

ROSSLYN C. BROWN and JAMES V. BROWN,
Defendants Below,
Respondents

On a former day, to-wit, July 20, 1992, came the petitioner, Mary A. Riffe, by David S. Skeen, her attorney, and presented to the Court her second petition out-of-time praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 25th day of October, 1991, which being seen and inspected by the Court is hereby refused.

A True Copy

Attest: /s/ Gail G. Ramey
Clerk
Supreme Court of Appeals